Forrest City Grocery Co. *and* International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO. Cases 26–CA–14486, 26–CA–14525, and 26–CA–14702

March 17, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On December 11, 1991, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Forrest City Grocery Co., Forrest City, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Discouraging membership in the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, or any other labor organization, by discriminatorily terminating employees or otherwise discriminating against them with regard to their tenure of employment or any term or condition of employment.''

2. Substitute the following for paragraph 1(c).

''(c) Creating the impression of surveillance of union activity.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, or any other labor organization, by discriminatorily terminating employees, or otherwise discriminating against them with regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT interrogate employees concerning their union attitude or activities or those of other employees.

WE WILL NOT create the impression of surveillance of union activity.

WE WILL NOT threaten employees with discharge or other reprisal because of their union or other concerted activity, or warn them not to engage in such activity.

WE WILL NOT inform employees that it would be futile for them to select a union as their bargaining representative, by indicating that we would not bargain in good faith with such union.

WE WILL NOT promise or grant employee benefits, or solicit employee complaints and grievances and thereby promise improved terms and conditions of employment, in order to discourage support for International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, or any other labor organization, provided however, that this does not require us to vary or abandon any economic benefit or any term or condition of employment which we have established.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole Melinda Hawkins for losses she suffered by reason of the discrimination against her, with interest.

WE WILL expunge from our files any reference to the termination of Melinda Hawkins, and notify her in writing that this has been done and that evidence of

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent excepts to the judge's finding that the Respondent's Philip Morris cigarette promotional campaign was showing a profit at the time the Respondent discharged Melinda Hawkins. Even assuming arguendo that the Respondent was losing money on the campaign, such factor, contrary to the Respondent's contention, did not form the basis for Hawkins' discharge in light of the fact that the Respondent did not examine its books to ascertain its profit or loss on the campaign until July 12, 1991, well after Hawkins' May 14, 1991 discharge.

We find it unnecessary to pass on the judge's finding that the Respondent's manager, David Cohn, created the impression of surveillance by displaying a blank union authorization card at employee meetings since this finding is cumulative.

[2] We have modified the judge's recommended Order and notice to conform to the violations found.

the unlawful discharge will not be used as a basis for future personnel actions against her.

FORREST CITY GROCERY CO.

Susan B. Greenberg, Esq., for the General Counsel.
Bart Sisk, Esq., of Memphis, Tennessee, for the Respondent.
Ernestine Weaver, Esq., of Forrest City, Arkansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. These consolidated cases were heard at Memphis, Tennessee, on October 9 and 10, 1991.[1] The charges were filed respectively on May 22, June 10, and September 12, and the amended charges in Cases 26–CA–14525 and 26–CA–14702 were filed respectively on July 10 and October 3, by International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO (the Union). The consolidated complaint, which issued on October 4, alleges that Forrest City Grocery Co. (Respondent or the Company) violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. The gravamen of the complaint is that the Company allegedly discharged employee Melinda Hawkins because of her union or other protected concerted activities, and allegedly threatened its employees with reprisal, expressly and impliedly promised and granted benefits, stated that it would not hire union adherents, and that it would be futile for its employees to select the Union as their representative, and engaged in interrogation and created the impression of surveillance, all in order to discourage support for the Union. The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. General Counsel and the Company each filed a brief. At the close of General Counsel's direct case I granted the Company's motion to dismiss paragraph 7 of the complaint, and General Counsel's motion to strike, paragraph 8, subparagraphs (e), (f), (g), (l), (m), and (n) of the complaint. In its brief, General Counsel also requests that subparagraph (r) be withdrawn. The request is granted.

On the entire record in this case and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs submitted by General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, a corporation with an office and place of business in Forrest City, Arkansas, is engaged in the wholesale distribution of grocery products. In the operation of its business the Company ships and receives products valued in excess of $50,000 directly across state lines. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[1] All dates are for 1991 unless otherwise indicated.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Melinda Hawkins applied for work with the Company on March 18, and was interviewed by Company Manager David Cohn. Her application indicated that she worked 8 years for the Sanyo Company, and was laid off. Cohn said he would get back to her. She called about 2 weeks later. Cohn said he had nothing then, but she should call again the following week. Hawkins called, and Cohn told her to come in the next morning (April 5). She did. Hawkins testified in sum as follows: Cohn offered her a job, saying that she would be doing promotions for Phillip Morris. He did not say how long the job would last. He said she would make $5.30 or $5.45 per hour (Hawkins was not sure) and would get a raise in 30 days. Hawkins initially testified that she did not recall what if anything was said about her prior employment history. She subsequently testified that when she came in for interview, Cohn asked where she worked, and she mentioned Sanyo (Hawkins did not make clear whether this discussion took place on March 18 or April 5. The context suggests that it probably occurred in the initial interview). Cohn told her ''that he had promised hisself [sic] that he was not going to hire any Sanyo peoples because he hoped that we had learned a lesson that the union had got us without a job.'' Cohn also asked if she knew Ronald Rucker. Other testimony indicates that there was a strike at Sanyo. The record fails to identify Ronald Rucker.

Hawkins accepted the offer and began working that same day. She further testified in sum as follows: Basically her only work involved the Phillip Morris promotion, which substantially consisted of assembling Phillip Morris' promotional items, e.g., T-shirts, for shipment with cigarette orders to the Company's customers. She spent a small amount of time stamping cigarette packs. Phillip Morris Area Manager Bryan Spotts came to the Company about every 2 or 3 weeks. In early May Spotts came by, told her she was doing a good job, and said he had just paid Cohn. In her investigatory affidavit, Hawkins said Spotts told her on April 12 that she was doing a very good job (not indicating any other date). Hawkins testified that Spotts complemented her on more than one occasion. As of the date of her termination (May 14), Hawkins had just completed one promotional order and had eight other orders remaining to be filled.

Hawkins further testified in sum as follows: Some 2 or 3 weeks after she began work, in the breakroom, she discussed a union with other employees. After their conversation she contacted Union Representative Dickey Banks, who furnished her with authorization cards. Hawkins solicited and obtained four signed cards away from the company facility, including one at her home. At about 10 a.m. on May 14, during the morning break, in the breakroom, Hawkins distributed cards to employees, and obtained six or seven signed cards. No supervisor was present. This was the only time she distributed cards on company premises. At about 3:30 p.m. she was summoned to Cohn's office. Cohn initially said that she was terminated, and then said she was laid off, that ''the job had played out.'' Hawkins testified that Cohn did not say he was losing money on the promotional program. However

in her affidavit Hawkins stated that Cohn said he had to let her go because he was losing money with the job, and this was the end of the job. Hawkins' testimony concerning her union activity was corroborated by then employee Edward Sparks and current employee Eddie Adams. Sparks and Adams testified in sum that on the morning of Hawkins' discharge, almost the entire day shift was present in the breakroom, Hawkins asked the employees to sign union authorization cards, and some seven employees signed cards.

Manager Cohn testified in sum as follows: Phillip Morris has a promotional program whereby promotional items are shipped to the distributor's customers together with cigarettes. The Company participated in the program, with Phillip Morris sales representative Herbert Versie doing the necessary work of assembling promotional items with cigarettes. Area manager Spotts proposed that instead the Company could use its own employee to do the work. The employee would be paid $5 per hour (less than the pay of Phillip Morris' representative) and Phillip Morris would reimburse the Company monthly, paying enough to ensure that the Company would also make a profit on the arrangement. Cohn agreed to the arrangement. There was no written contract, although Spotts wrote up the plan to show how the Company would make a profit. Cohn hired Hawkins do to the promotion, and Spotts and Versie trained her. He did not tell Hawkins or anyone else that he would not hire anyone from Sanyo. The Company has many employees who worked at Sanyo. Cohn was satisfied with Hawkins' work, and he received no complaints from Phillip Morris. The promotion accounted for about 90 percent of her work. However, Cohn decided to end the program because the Company was losing money on it. On May 14, without consulting with or notifying Phillip Morris or his father, Company President William Cohn, he discharged Hawkins. Spotts and Versie completed the remaining work, and the Company no longer participates in the promotional program. Cohn did not hire anyone to replace Hawkins. However, on May 13 he hired Michael Reeves as a helper on trucks, and on May 14 he hired Lester Brooks as a warehouseman. At the time Cohn terminated Hawkins he did know of her union activity, and it would have made no difference to his decision if he had known. He first learned about the union activity from employee Adams on May 16. In his investigatory affidavit to the Board, Cohn stated that he had not received any money from Phillip Morris even as of the time he gave the affidavit. This was not true. Cohn testified that ''I think he [Spotts] paid me $500 coming in here,'' i.e., Phillip Morris gave the Company an initial payment of $500 when they began the program. The Company's records also indicate that Phillip Morris made a payment on May 2, thereby corroborating Hawkins' testimony. The payment was evidently in the amount of $516 (as indicated by Spotts' calculations) although the cancelled check or ledger entry was not produced at the hearing. Cohn testified that he did not learn until July 12 that Phillip Morris made the payment. His assertion is incredible. If Cohn were concerned that the Company was losing money on the program, then it is probable that he would have checked whether the Company had received any payments, and how much, and if not, why, before making a decision. Cohn's assertion that the Company was losing money on the program was also false. As indicated, as of May 2 the Company had received a total of $1016 from Phillip Morris. The Company's payroll records indicate that Hawkins received total wages of $499.60 in April and $577.75 in May. As Phillip Morris had not yet compensated the Company for May, it is evident that the Company was ahead the time of Hawkins' discharge. If Cohn wanted to terminate the program for economic reasons, rather than as an excuse to get rid of Hawkins, then it is probable that Cohn would have first notified Phillip Morris that he wished to withdraw from the program, and permitted Hawkins to finish the remaining work, instead or abruptly firing her. However in order to fully evaluate Hawkins' case, it is necessary to consider alleged conversations and meetings involving management, which are the subject of additional unfair labor practice allegations.

General Counsel presented testimony concerning alleged conversations between individual employees and Cohn and Day Supervisor McKinley Watson. Eddie Adams, who pulls orders on the night shift, testified in sum as follows: On Wednesday, May 22 at about 3:45 p.m. on the shipping dock, he had a conversation with Cohn and Watson. At that time Adams was working days. Cohn asked Adams if he attended the union meeting on Saturday (evidently May 18). Cohn also asked if three other named employees were present, specifically, Donald Strong, Jimmy Ross, and Jimmy Kidd. Adams, who attended the meeting, asked Cohn how he knew they were there. Cohn answered ''because I was there,'' although he was not. Watson then asked whether Melinda Hawkins was the leader of the union campaign and whether she made house calls to solicit signed union cards. Adams answered no to both questions. He considered his answers to be true, because to his knowledge she did not make house calls, and he made his own decisions and did not consider anyone to be his leader. Watson also asked Adams if he signed a union card. Adams answered truthfully, that he did. Watson responded that he should not have done that. Adams did not give Cohn a blank union card or say that he was against the Union.

Jimmy Ross was also called as a General Counsel witness. He works as a stocker on the day shift. Ross, an obviously reluctant witness, initially testified that Cohn asked him if he knew Melinda Hawkins was fired, and whether he thought she was with Sanyo. Ross subsequently backed away from this testimony, saying that he did not have a conversation with Cohn after Hawkins was fired. General Counsel confronted Ross with his affidavit in order to impeach his testimony. The affidavit may not be used as substantive evidence. Ross subsequently testified that ''a guy'' asked him if he thought Hawkins was with Sanyo or Ernestine Weaver or Dickey Banks (Weaver and Banks being union representatives). Ross also testified that following a Saturday union meeting he told Cohn that he did not see Hawkins because she was dodging him. I find with respect to this matter that General Counsel failed to establish a prima facie case of unlawful interrogation. Therefore I am recommending that the pertinent allegation of the complaint (par. 8(c)) be dismissed.

Willie Cross works in the freezer department on the night shift. Cross testified in sum as follows: In February or March Cohn summoned Cross to his office. Cohn asked if Cross knew that the Union was getting started back up. Cross answered no. Cohn said he would put Donald Strong in the freezer with his partner (Bennie) Graham, so that they could talk about the Union.

Strong was transferred to the refrigerator section in March, and has worked there since that time. He was twice laid off by the Company. Strong testified in sum as follows: Probably in April, at a time when he was on layoff, he went to Cohn to ask why he was laid off. Cohn told him that it was because he did not attend a meeting for the section personnel. Cohn also told Strong that Strong thought he was a big shit, going around soliciting votes for the Union and talking to other employees about the Union. He said he wanted to show Strong who were his friends and who were not, and that Bennie Graham was not his friend. Cohn said that he paid Strong's bills and took care of his family, and they could work out their own problems. Strong responded that Cohn was not his friend and that Strong took care of his own family. General Counsel does not allege in this proceeding that the transfer or layoffs were unlawful. An allegation that Strong was unlawfully given a 3-day suspension in June, was amended out of the complaint.

The Union has engaged in some four or five organizational campaigns at the Company. There is a history of prior unfair labor practice charges against the Company, none of which were litigated. Among General Counsel's present witnesses, Eddie Adams, Bennie Graham, and Willie Cross were previously named as alleged discriminatees, and their cases were settled. Manager Cohn testified in sum as follows: He first learned about the present union organizational campaign on May 16, when Adams showed him an authorization card. Adams said, ''They're working on us and I want you to know I've learned my lesson and I'm on your side, and I'm not getting involved.'' Cohn never asked Adams about his union activities or whether he attended a union meeting, or if other employees attended. He did not have a conversation in his office with Donald Strong about the Union, and he did not say that Strong thought he was a big shit because of the Union. In February or March he assigned Strong to the freezer because the employees there were not rotating perishables properly, and he knew Strong to be a good picker. He explained this to Strong, and he did not say that he assigned Strong there to talk about the Union with Bennie Graham. He did not discuss the Union in his office with Willie Cross. He talked to Cross about the problems in the refrigerator section. Cross had been a union observer in a prior election, but Cohn promoted him to a leadman position in the refrigerator department and gave him a raise. Cohn did not testify concerning the alleged conversation with Jimmy Ross. Supervisor Watson testified that he did not have a conversation with Adams on May 22 in which he asked him about his union activities, or ever ask him whether he or other employees went to a union meeting, or ask him about Hawkins' union activity. However, although Adams testified that both Cohn and Watson were involved in the alleged May 22 conversation, they did not corroborate each other's testimony concerning the matter; i.e., concerning what the other supervisor said or did not say, or whether both were present in a conversation in which union activity was discussed.

I credit Adams' testimony concerning his conversation with Cohn and Watson, but with a qualification. As indicated, I have problems with Cohn's credibility, as demonstrated by his testimony concerning Hawkins' discharge. I have no comparable reservations with respect to Adams' credibility. Adams was still in the Company's employ at the time of the present hearing, and therefore his testimony is entitled to special weight. He demonstrated a clear recollection of the conversation.[2] However, I find it probable that as indicated by Cohn, Adams began the conversation by assuring Cohn that he was no longer a union adherent. At this point Cohn and Watson sought to test Adams by determining whether he could be used as a reliable source of information concerning the union campaign. It is unlikely that they would probe Adams as a source of information if they still believed he was a strong union supporter. I find that the Company, by Cohn and Watson, violated Section 8(a)(1) by coercively interrogating Adams concerning his union activity and that of other employees. They had no legitimate reason to question Adams, and they gave him no assurance against reprisal. On the contrary, Watson warned Adams that he should not have signed a union card. Cohn was a high level official, not only company manager, but a member of the family which owned the Company. The circumstances indicate that Cohn and Watson were seeking information for the purpose of defeating unionization by unlawful means, through determining the extent of union support and the means by which union activity was conducted. The interrogation was accompanied by unlawful statements, and as will be further discussed, occurred in the context of other unfair labor practices. Specifically, in the present conversation, Cohn created the impression of surveillance of union activity, by telling Adams that he knew who was present at the Saturday union meeting because he was there. As Adams knew that Cohn was not present at the meeting, the plain implication of Cohn's remark was that he had an employee informer or informers. Although the complaint does contain an allegation that the Company created the impression of surveillance in this conversation, the matter of the conversation was fully and fairly litigated, and therefore the remark may be the basis of a finding of unfair labor practice. The remark is also significant because it constituted an admission that Cohn did in fact have an employee informant or informants, and therefore had a source of information from which he could have learned of Hawkins' union activity prior to her discharge. I further find that Watson's warning that Adams should not have signed a union card, coming only 8 days after Hawkins' discharge, conveyed the clear implication of reprisal against em-

[2] I have also taken into consideration in evaluating Cohn's credibility, the fact that in 1987 he was convicted of Federal income tax evasion (26 U.S.C. § 7201), a crime punishable by more than 1 year's imprisonment, and which involves dishonesty or false statement. See Rule 609, Federal Rules of Evidence. However, I have not taken into consideration with respect to the credibility of either Cohn or Adams, an assertion that Cohn attempted to improperly influence a juror in a civil lawsuit. The testimony concerning this matter is disputed, and does not afford an adequate basis for resolving the merits of the present case. In sum, I cannot resolve the present credibility question by attempting to resolve another credibility issue which is unrelated to this case. See Rule 608, Federal Rules of Evidence. I am not persuaded by other arguments advanced by the Company as to why Adams should not be credited. As indicated, Adams did not lie to Watson and Cohn concerning Hawkins' union activity. If he had, this would not have impugned Adams' credibility, because the supervisor had no right to question him concerning other employees' union activity. Adams also readily admitted that he has borrowed money from Cohn. His testimony that he did not borrow money in May has minimal significance to his credibility, particularly since the alleged falsity of this testimony is dependent on questionable alleged informal notations.

ployees who joined the Union. The warning constituted an implied threat, and was violative of Section 8(a)(1). See *Whitewood Maintenance Co.*, 292 NLRB 1159, 1164 (1989), enfd. sub nom. *Texas World Service Co. v. NLRB*, 928 F.2d 1426 (5th Cir. 1991). The allegations of paragraphs 8(o) and 9 of the complaint have been sustained by the evidence.

With regard to Cross' testimony, the complaint alleges (par. 8(p)), that in late March Cohn interrogated an employee about the union activities of other employees. (G.C. Br. 18, 23.) Strangely, the complaint does not allege that Cohn unlawfully told Cross that he would transfer Strong to the freezer because of his union activity, although this was central to the alleged conversation. The complaint also does not allege that Strong's transfer was unlawful. This suggests that General Counsel has reservations about Cross' credibility. It is also significant that the evidence fails to indicate any union activity among the Company's employees in February or March, or even rumors of such activity. Therefore it is unlikely that Cohn would question Cross about such activity at that time. I do not credit Cross, and I am recommending that paragraph 8(p) of the complaint be dismissed.

With regard to Strong's testimony the complaint alleges (par. 8(b)) that in early April Cohn threatened an employee with unspecified reprisals because of the employee's membership in or support of the Union. General Counsel does not discuss this allegation in its brief, leaving me in the dark as to what in this conversation constituted an unlawful threat. I credit Strong's testimony. Strong was still in the Company's employ at the time of the present hearing. He impressed me as a candid witness. Strong unhesitatingly admitted that Cohn gave him a legitimate reason for his layoff. However I find that Cohn did not, as alleged in the complaint, threaten Strong in this conversation. Strong was an outspoken union adherent who did not hesitate to speak his mind to Cohn. His testimony indicates that they engaged in a robust and freewheeling argument about unionization, in which Cohn momentarily lost his temper and made an insulting but nonthreatening remark about Strong. Therefore I am recommending that this allegation of the complaint be dismissed. See *Hudson Hosiery*, 109 NLRB 1410, 1421 (1954), and *Montgomery Ward & Co.*, 187 NLRB 956, 964 (1971) (Board held in sum that employer did not violate the Act by calling union activists union stooges, persons of low character, scum and dumb-dumb).

General Counsel alleges that Cohn, through and in connection with speeches to employees following Hawkins' discharge, committed further violations of Section 8(a)(1). The Company operates with a day and a night shift. The Company ships goods at night and receives goods during the day. Employees Donald Strong and Bennie Graham testified concerning a speech to night-shift employees shortly after Hawkins' discharge. Strong testified in sum as follows: About a week or two after Hawkins' discharge, Cohn called a meeting of the night crew on the loading dock. He held up a union card and said ''they're back.'' He said they were like a family, the employees did not need the IUE or to pay someone to solve their problems. Cohn asked if he ever lied to the employees. At this point Strong spoke up. He said Cohn was a liar, because during the last union campaign in 1988 he made promises which were not fulfilled. Cohn responded that Strong was in a hole, and without explaining his remark, angrily left the dock. No other employees spoke at the meeting. Graham testified in sum as follows: The meeting took place on May 16. Cohn held up a union card and said ''it's back, the IUE.'' He appeared to be reading off a paper. He said ''if anyone approach you with union cards the best thing for you to do is not sign them.'' Cohn asked anyone who believed he could not fire anyone to raise their hand. Only three foremen raised their hands. Cohn asked if he had ever lied to anyone. Strong stood up, and said that Cohn lied in the first campaign, and was now manipulating the employees and biased. Cohn said Strong was in a hole, without explaining his remark. Strong said that Cohn fired Graham for no reason at all. Cohn answered that he took Graham back. Strong replied that the IUE and the Board got him back (Graham was reinstated pursuant to settlement of an unfair labor practice charge).

Employees Eddie Adams, Joe Willie Mays, and then employee Edward Sparks testified concerning a meeting for day-shift employees. Sparks testified in sum as follows: One or two days after Hawkins' discharge, Cohn addressed a meeting of day-shift employees. He said ''our friend,'' the IUE is back. Cohn said that if the Union got in it would be like him on one side and the Union on the other, they would make suggestions and it would be up to him to agree, and they would probably go back and forth and get nowhere. He said it was possible to come to a strike, referring to Sanyo and Greyhound, and if so it was possible the employees would be out of a job, because he could call in workers and if nothing happened, he would not have to call back the striking employees. Toward the end of the meeting, Cohn said that if the employees had problems they could come to see him. After the meeting broke up, but while employees were still present, Joe Willie Mays told Cohn he needed some money. Cohn told Mays to see him in his office. Cohn conducted meetings for employees only during union organizational campaigns. Sparks never borrowed money from the Company, but he knew of employees who did. Sparks did not hear any discussion concerning handbooks. Adams testified in sum as follows: At the meeting, Cohn held up a blank union card and said ''our old friend the IUE is back.'' He said they did not need anyone to come into the warehouse and clean up their act for them, that they were all one big family and could handle their own situation. Cohn told the employees that if they had any problems they could write a note on a pad and bring it to him and leave it on his desk, and he would look it over. Joe Willie Mays testified in sum as follows: At the meeting Cohn said the Union was back again. He said that the employees could talk to him about their problems. He said the Company would give them handbooks. As Cohn was leaving, Mays asked to borrow $200. Cohn told Mays to see him in his office about the money. Mays went to his office, and Cohn gave him a check for $200. Mays repaid the loan. He has previously borrowed money from Cohn. Cohn has previously asked the employees to come forward if they had problems, and he told them they could form a group to discuss problems with him.

Cohn and Day Supervisor Watson, the only company witnesses, did not testify concerning either the day-or night-shift meetings. Cohn testified that the Company has a policy permitting loans to employees, and he and his father have tried to accommodate requests for loans in small amounts, such as $15 or $20, or in important situations, in amounts as large

as $100. The Company introduced informal records indicating loans to Eddie Adams in amounts ranging from $15 to $30. Mays repaid the $200 loan at the rate of $50 per week. Cohn testified that he did not loan employees money in order to influence their union sentiments.

The complaint alleges (pars. 8(h), (i), (j), and (k)) that in his speeches to the day-and night-shift employees, Cohn unlawfully: (1) threatened employees with termination of their employment if they joined or supported the Union; (2) solicited employee complaints and grievances and thereby promised improved terms and conditions of employment in order to discourage union support; (3) told the employees that it would be futile for them to select the Union as their bargaining representative; and (4) granted an employee (Mays) a $200 advance in order to discourage support for the Union. General Counsel further alleges invoking paragraph 8(d) of the complaint (G.C. Br. 12) that Cohn created the impression of surveillance of union activities by displaying the blank union authorization card. The Company argues (Br. 20) that the day-shift meeting is not properly before me for decision, because paragraphs 8(h), (i), (j), and (k) refer to speeches to the day and night shifts in the dock area, whereas the employee witnesses testified to a day-shift meeting in the breakroom. Paragraphs 8(d), (e), (f), and (g) of the complaint which were dismissed on motion of General Counsel, do not refer to a meeting. Rather the text, which refers to ''an employee'' indicates an alleged conversation in the breakroom on or about May 16 between Cohn and an employee. Jimmy Ross' affidavit (Tr. 147–148) suggests that General Counsel anticipated proving these allegations through Ross' testimony. However, the language of paragraph 8(d) could literally apply to the day-shift meeting. The Company did not object at the hearing to testimony concerning the day-shift meeting on grounds that it exceeded the scope of the complaint. It is evident that about 2 days after Hawkins' discharge, Cohn addressed assembled day-and night-shift employees concerning the union organizational campaign. The deviation between the pleadings and the testimony, i.e., that the day shift meeting took place in the breakroom rather than in the dock area, was minor. The Company was on notice that both employee meetings were in litigation and could be made the basis for unfair labor practice findings. The meetings were fully and fairly litigated. The Company chose not to present its own witnesses concerning the meetings, but exercised its right to cross-examine General Counsel's witnesses. The day and night shift meetings are properly in evidence and may be considered on the allegations of paragraphs 8(d), (h), (i), (j), and (k) of the complaint.

The Company did not contradict the testimony of General Counsel's witnesses concerning the meetings. I am not persuaded that Cohn mentioned a handbook at either meeting. Only one witness (Mays) referred to a handbook, and Sparks testified that he did not hear any discussion of handbooks. If Cohn promised a handbook at the day shift meeting, then he probably would have also done so at the night shift meeting. With this qualification, I credit the employees' testimony as collectively reflecting what transpired at the meetings. I find that at the night shift meeting, Cohn twice impliedly threatened employees with discharge because or if they engaged in union or other protected concerted activity. Cohn, in the presence of the employees, impliedly threatened Strong with discharge by telling him he was in a hole. At the time Strong was engaged in protected concerted activity. Cohn invited discussion from the employees, and Strong spoke by accusing Cohn of making unkept promises during the last union campaign. Cohn's retort was in direct response to Strong's expression of opinion concerning terms and conditions of employment. His remark could reasonably be interpreted by the employees as indicating that Strong's job was in jeopardy because of his statement. Cohn further impliedly threatened discharge by telling the employees that they should not sign union cards, and following this statement by asking whether they believed he could not fire anyone. The plain implication was that employees who disregarded his warning by signing union cards, risked discharge. The allegations of paragraph 8(h) have been sustained by the evidence.

I further find that at the day-shift meeting, Cohn solicited employee grievances, thereby impliedly promising redress of such grievances, and gave Mays a $200 loan in order to discourage employee support for the Union. With regard to solicitation of grievances, the applicable standard is set forth in *Uarco, Inc.*, 216 NLRB 1 (1974):

> the solicitation of grievances at preelection meetings carries with it an inference that an employer is implicitly promising to correct those inequities it discovers as a result of its inquiries. Thus, the Board has found unlawful interference with employee rights by an employer's solicitation of grievances during an organizational campaign although the employer merely stated it would look into or review the problem but did not commit itself to specific corrective action; the Board reasoned that employees would tend to anticipate improved conditions of employment which might make union representation unnecessary. However, it is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances or a concurrent interrogation or polling about Union sympathies that is unlawful; the solicitation of grievances merely raises an inference that the employer is making such a promise, which inference is rebuttable by the employer.

Uarco was cited with approval in *NLRB v. Okun Bros. Shoe Store*, 825 F.2d 102, 108–109 (6th Cir. 1987). In the present case, the testimony of employees Adams, Sparks, and Mays indicates that after Cohn asserted that the employees did not need a union, Cohn solicited the employees to come directly to him with their problems and he would look them over. He did not either expressly or by implication say that he was not making any promises. On the contrary, Cohn made use of an opportunity to demonstrate that he was making promises. When Mays asked for a $200 loan, Cohn immediately accommodated him, notwithstanding company policy of giving loans to employees only in much smaller amounts. Mays made his request in direct response to Cohn's solicitation of grievances. Cohn had previously conducted meetings at which he invited employees to air their problems, but he conducted such meetings only during union organizational campaigns. He did not have an ''established practice'' of conducting such meetings.[3] Therefore Cohn violated Section

[3] Therefore the Company's reliance on *Westinghouse Electric Corp.*, 277 NLRB 424 (1985), is misplaced. (Br. 23.) *Clark Equipment Co.*, 278 NLRB 498 (1986), also relied on by the Company,

8(a)(1) both by soliciting grievances with the implied promise they would be redressed, and by the unprecedented action of granting an employee a $200 loan, all in order to discourage support for the Union. See *Downtown Toyota*, 276 NLRB 999, 1019 (1985); *National Micronetics*, 277 NLRB 993, 1003 (1985). However, the testimony fails to demonstrate that Cohn promised or granted benefits at the night shift meeting. The allegations of paragraphs 8(i) and (k) have been sustained with respect to the day-shift meeting.

General Counsel's allegation (par. 8(j)) that the Company violated Section 8(a)(1) by informing the employees that it would be futile for them to select the Union as their bargaining representative, rests on the testimony of Sparks concerning the day-shift meeting. The allegation presents a close question, as Cohn's statements fall between statements found to be unlawful in cases cited by General Counsel (Br. 15), and statements held lawful in cases cited by the Company (Br. 24). In the former, the employer spoke in absolute terms concerning the consequences of unionization. In *Pioneer Concrete Co.*, 282 NLRB 749, 753 (1987), the employer told the employees that ''selection of the Union *would* result in them going on strike and *would* result in the employees losing their jobs.'' (Emphasis added.) The employer thereby unlawfully anticipated a refusal to bargain in good faith with that Union. In *Taylor Chair Co.*, 292 NLRB 658 fn. 2 (1989), the employer asserted that ''it *would* close the plant if the Union won the election.'' (Emphasis added.) However in *Clark Equipment Co.*, supra, the employer spoke of strikes as a ''possibility.'' In *Pilliod of Mississippi*, 275 NLRB 799 (1985), the employer said that bargaining ''could'' begin at ground zero, and the employees ''might'' lose their benefits. In *Telex Communications*, 294 NLRB 1136 (1989), the employer asserted that bargaining involved give-and-take and the employees might ''win, lose or draw.'' The Board held the employer's statements unlawful in *Pioneer* and *Taylor*, but lawful in *Clark, Pilliod*, and *Telex*. In the present case, Cohn said that it was up to him to agree to the Union's ''suggestions,'' and they would ''*probably* get nowhere'' (emphasis added). Cohn then talked about the possibility of a strike, referring to Sanyo and Greyhound, and the possibility of permanent replacement. Cohn offered no objective basis for his assertion that the parties ''probably'' would get nowhere in bargaining. Cohn emphasized that it was up to him to agree with the Union's ''suggestions,'' thereby indicating that it would be his actions which would probably result in the parties getting nowhere. The implication of Cohn's remarks is that he would not bargain in good faith with the Union, thereby probably foreclosing agreement. Therefore I find that Cohn violated Section 8(a)(1) by informing the employees that it would be futile for them to select the Union as their bargaining representative. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–620 (1969). The allegations of paragraph 8(j), with respect to the day-shift meeting, have been sustained by the evidence.

I further find that Cohn created the impression of surveillance of the employees' union activity by displaying a blank union authorization card and announcing that the IUE was back. The employees did not know where Cohn got the card. They could reasonably infer that Cohn was using an employee informer. As found, Cohn impliedly admitted to Eddie Adams that he was using an informer or informers. The Company violated Section 8(a)(1), and the allegations of paragraph 8(d) have been sustained by the evidence.

Employees Strong, Sparks, and Graham testified concerning a speech by Cohn at a company-sponsored barbeque for its employees at the Civic Center in Forrest City. (Employee Cross did not attend the barbeque.) Most company employees attended. Graham testified that the barbeque took place about June 1. Strong, Sparks, and Graham testified in sum as follows: Cohn said the area employers all felt bad about the Union trying to get into the Company. He said 1 man called him a liar, but 20 others did not, and Strong was wrong for calling him a liar. He said he cared about the employees, and the employees had an opportunity to speak if they had ideas to better the Company. Employee Napoleon Sergeant (who signed a union card given to him by Hawkins) said that if they had hospitalization and pension benefits it would not bother him to get only $150 in take home pay. Cohn said that was a good idea and would look into it. He said the Company would bring in a consultant who would conduct a survey to determine the Company's problems, and it would not cost the employees anything. The Company had not previously conducted such a survey. Employees Strong, Graham, and Mays further testified in sum as follows: Some time after the barbeque, Night Supervisor Alfred Davis distributed and subsequently collected questionnaires for the employees. They were not required to answer the questions, although some employees did so. Among other questions, the questionnaire asked whether the employees thought passing the buck was a problem in the Company, what the employees thought of their job, and whether the employees preferred a credit union or the Company to handle their money. The Company never previously distributed such a survey. The employees heard nothing more about the survey. Cohn did not testify about either the barbeque or the subsequent survey.

The complaint alleges in sum (pars. 8(q) and (s)) that on or about June 18, the Company by Cohn's speech to day-shift employees, promised its employees improved terms and conditions of employment in order to discourage union support, and in or about mid-August, solicited employee complaints and grievances through a questionnaire, thereby promising improved terms and conditions of employment in order to discourage employee support for the Union. The Company argues that paragraph 8(q) should be dismissed because ''the record is devoid of any evidence of a June meeting.'' (Br. 28.) The argument is without merit. The Company did not object to receipt of testimony concerning Cohn's speech at the barbeque. The matter of the speech was fully and fairly litigated. The Company chose not to present Cohn's testimony concerning the speech. Moreover, the speech arguably falls within the allegation of paragraph 8(q). The barbeque speech and subsequent distribution of the questionnaire are properly before me for decision, and may be considered in connection with the allegations of paragraphs 8(q) and (s). I credit the employees' testimony, and find that they collec-

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is also not in point. In that case, the Board held in sum that an employer does not solicit grievances by reminding employees of the good conditions they enjoy. In the present case, Cohn did not rely on that argument. Rather, he indicated that he knew there was employee dissatisfaction, and he solicited the employees to come to him with their problems, without a union, so that he could deal with them.

tively reflect what Cohn said at the barbeque. I find that the Company, through Cohn's barbeque speech and subsequent distribution of the questionnaire, solicited employee complaints and grievances and thereby impliedly promised improved terms and conditions of employment in order to discourage employee support for the Union. Cohn coupled antiunion remarks with an express request for the employees to make suggestions as to how to improve the Company. Cohn did not say that he was not making any promises. On the contrary, when employee Sergeant asked for hospitalization insurance and pension benefits, Cohn answered that this was a good idea and he would look into it. Cohn expressly promised a survey, which would impliedly lead to improvement in existing terms and conditions of employment. The subsequent questionnaire was a direct consequence of that promise. Like Cohn in his speech, the questionnaire did not say that the Company was not making any promises.[4] The Company violated Section 8(a)(1), and the allegations of paragraphs 8(q) and (s) have been sustained by the evidence. See *Mid-State Distributing Co.*, 276 NLRB 1511, 1557–1558 (1985).

This brings me back to the matter of Melinda Hawkins. The complaint (par. 8(a)) alleges that on or about April 5, Cohn told an employee (Hawkins) that the Company would not hire applicants for employment who had previously joined and supported a union. As previously indicated, I have reservations concerning the credibility of both Cohn and Hawkins. I am not persuaded that Cohn told Hawkins he would not hire anyone from Sanyo. Cohn probably made a disparaging remark about the employees who went on strike at Sanyo, but Hawkins probably got it garbled. If Cohn believed that the employees at Sanyo learned a lesson, i.e., that the Union lost their jobs by going on strike, then it is unlikely that he would say he would refuse to hire them. It is uncontroverted that the Company has hired employees who worked at Sanyo. Cohn hired Hawkins, although he could easily have avoided doing so, and she never told him she did not support the Union. Therefore I am recommending that this allegation of the complaint be dismissed. However, I find that Cohn discharged Hawkins because of her leading role in the union campaign, and thereby violated Section 8(a)(1) and (3) of the Act. I specifically find that Cohn knew of Hawkins' union activity at the time he discharged her. Cohn made use of an employee informer or informers. He and Supervisor Watson engaged in intensive interrogation to determine the extent of union support among the employees. Hawkins did not attempt to conceal her activity. She solicited cards in the breakroom at a time when nearly all day-shift employees were present. That same day Cohn discharged Hawkins, giving a false reason. The inference is warranted, and I so find, that Cohn learned she was the principal figure in the union campaign, and decided to get rid of her immediately. Cohn was demonstrably opposed to unionization to the point of engaging in unlawful threats and other unfair labor practice conduct following Hawkins' discharge. In light of the Company's strong hostility to unionization, Hawkins' leading role in the union campaign, the timing of Hawkins' discharge, and circumstantial evidence that Cohn knew of Hawkins' union activity, General Counsel presented a prima facie case that the Company terminated Hawkins because of her union activity. For the reasons previously discussed, the Company's professed reason for terminating Hawkins was false and pretextural. It follows that the Company failed to meet its burden of establishing that it would have terminated Hawkins in the absence of her union activity. The Company violated Section 8(a)(1) and (3) by discharging Hawkins.

The Company reinstated Hawkins in August (apparently on August 5), and General Counsel does not seek a reinstatement order in this proceeding. However the parties disagree as to the measure of backpay. I find that Hawkins is entitled to backpay from the time of her discharge until the date of her reinstatement. The Company terminated its participation in the Phillip Morris promotional program as a means of getting rid of Hawkins, and not vice versa. Therefore the Company's termination of its participation in the plan was also unlawful, and cannot be used as a basis for cutting off backpay. See *O.K. Trucking Co.*, 298 NLRB 804 (1990).

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discriminatorily discharging Melinda Hawkins, thereby discouraging membership in the Union, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom, to post appropriate notices, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company discriminatorily terminated Melinda Hawkins, it will be recommended that the Company be ordered to make her whole for any loss of earnings and benefits that she may have suffered from the time of her termination to the date of her reinstatement. I shall recommend that the Company be ordered to expunge from its records any reference to the unlawful termination of Hawkins, to inform her in writing of such expunction, and to inform her that its unlawful conduct will not be used as a basis for further personnel actions against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Hori-*

[4] That fact distinguishes the present case from *Bell Hatter*, 276 NLRB 1208, 1215–1216 (1985), cited by the Company (Br. 27). In Bell Hatter, *the employer's survey questionnaire conspicuously stated that the questionnaire did not imply that the employer was making or promising any changes in employees' wages, benefits, or working conditions.*

zons for the Retarded, 283 NLRB 1173 (1987).[5] The Company shall be required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the computation of backpay due.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Forrest City Grocer Co., Forrest City, Arkansas, its officers, agents, successors, and assigns, shall 1. Cease and desist from

(a) Discouraging membership in the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, or any other labor organization, by discriminatorily terminating employees, or in any other manner discriminating against them with regard to their tenure of employment or any term or condition of employment.

(b) Interrogating employees concerning their union attitude or activities or those of other employees.

(c) Creating the impression of surveillance of union activity, by displaying union authorization cards or indicating that it spies on union meetings.

(d) Threatening employees with discharge or other reprisal because of their union or other concerted activity, or warning them not to engage in such activity.

(e) Informing employees that it would be futile for them to select a union as their bargaining representative, by indicating that it would not bargain in good faith with such union.

(f) Promising or granting employee benefits, or soliciting employee complaints and grievances and thereby promising improved terms and conditions of employment, in order to discourage support for the Union or any other labor organization; provided however, that nothing shall be construed as requiring Respondent to vary or abandon any economic benefit or any term or condition of employment which it has heretofore established.

(g) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Melinda Hawkins whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the termination of Melinda Hawkins, and notify her in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against her.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(d) Post at its Forrest City, Arkansas office and place of business copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[5] Under *New Horizons*, interest on and after January 1, 1987, is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''